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Reasons for decision

Mr. Kiomars Bazrafshan,

complainant,

and

Canada Post Corporation,

respondent.

Board File: 30106-C

Neutral Citation: 2014 CIRB 707

January 13, 2014

The Canada Industrial Relations Board (Board) was composed of Mr. Graham J. Clarke, Vice-Chairperson, sitting alone pursuant to section 156(1) of the *Canada Labour Code (Part II - Occupational Health and Safety) (Code)*.

Parties' Representatives of Record

Mr. Learie Charles, for Mr. Kiomars Bazrafshan;

Mr. Michael J. Torrance, for Canada Post Corporation.

I. Introduction

[1] Section 16.1 of the *Code* provides that the Board may decide any matter before it without holding an oral hearing. Having reviewed all of the material on file, the Board is satisfied that the documentation before it is sufficient for it to determine this complaint without an oral hearing.

[2] On August 26, 2013, the Board received a complaint from Mr. Kiomars Bazrafshan, alleging that his former employer, Canada Post Corporation (CPC), had disciplined and later terminated him due to his raising of safety issues under the *Code*.

[3] Mr. Bazrafshan filed a complaint setting out the chronology of events and attached a significant number of helpful documents related to those events.

[4] Mr. Bazrafshan has also grieved certain of the same matters. The facts indicate his bargaining agent, the Canadian Union of Postal Workers (CUPW), has assisted him and represented him on the instant matter.

[5] CPC argued that some, if not all, of Mr. Bazrafshan's allegations were filed outside the 90-day time limit found in section 133(2) of the *Code*. Moreover, CPC argued that no work refusal occurred and no reversal of the burden of proof exists under section 133(6) of the *Code*.

[6] CPC further argued that the case concerned its collective agreement and attempts to obtain appropriate medical information from Mr. Bazrafshan as a condition to allowing him to return to work. When Mr. Bazrafshan allegedly refused these requests, CPC terminated his employment.

[7] CPC also contested Mr. Bazrafshan's various remedial requests as constituting items falling properly within the jurisdiction of a labour arbitrator under the collective agreement.

[8] The extensive documentation filed highlighted the significant labour relations background which has resulted in various legal proceedings, including this complaint under Part II of the *Code*.

[9] The Board has concluded that no retaliation occurred as a result of Mr. Bazrafshan raising Part II safety issues. This decision does not consider the merits of any collective agreement issues, since those would fall within a labour arbitrator's jurisdiction.

[10] These are the reasons for the Board's decision.

II. Chronology of Events

[11] The Board will not quote extensively from the attachments Mr. Bazrafshan appended to his complaint, though they, along with those of CPC, have been reviewed in their entirety. Those attachments allowed the Board to appreciate the chronology of events which led to the filing of this complaint.

[12] Mr. Bazrafshan sent various emails, some of which he characterized as "Press Releases", about his situation at work. As an example, on January 8, 2013, he sent an email with the subject line "Urgent: Stop the Bullies at Canada Post" to many individuals and organizations. The main addressees were i) The Prime Minister, Mr. Harper, ii) the Leader of the Opposition, Mr. Mulcair, iii) other Members of Parliament, including the Minister of Labour, iv) the Canadian Human Rights Commission (CHRC), as well as individuals at CPC and CUPW.

[13] Mr. Bazrafshan also addressed his email to this Board.

[14] His email alleged certain CPC supervisors were engaging in acts of psychological violence, harassment and bullying against him and referred to certain alleged events in the 2009-2011 time frame. One allegation concerned a work injury which had occurred in November, 2010.

[15] Mr. Bazrafshan alleged that CPC had corporate security follow him while he was away from work due to an injury. He also alleged that CPC demoted him from full-time to part-time status when he returned to work after his injury. He alleged he had been bullied and harassed at a subsequent meeting with CPC supervisors and managers.

[16] The email contained particulars about various CPC supervisors and managers and their alleged conduct. Mr. Bazrafshan alleged that CPC failed to address his issues.

[17] Mr. Bazrafshan concluded his January 8, 2013 email with these paragraphs:

How extreme a "cry" should sound to warn you that bullying is a serious issue at the YDC and the CPC? What do you want to happen in order

for you to realize that you have the chance and the authority to "stop bullying" at the workplace, before it is too late?

I cannot breath. I expect an immediate action.

[sic]

[18] On January 11, 2013, after receiving a copy Mr. Bazrafshan's January 8, 2013 email, this Board advised him in writing that his email was "not an approved method for filing a complaint at the Canada Industrial Relations Board and therefore, no further action will be taken to process or open any file as a result of your communication". The only complaint this Board subsequently received from Mr. Bazrafshan was the instant one filed on August 26, 2013.

[19] On January 14, 2013, CPC issued Mr. Bazrafshan an emergency suspension as a result of his email:

This form confirms the voice mail left for you at approximately 20:36 hrs on January 14, 2013 and advises you that the emergency suspension issued to you on January 14, 2013 has been extended; **you are therefore suspended from duty indefinitely without pay, pending an investigation.** You are instructed not to report to your regularly scheduled shift until further notice.

The reasons(s) for the suspension is/are: Due to the fact that Canada Post Corporation became aware of a letter which you allegedly sent on January 7, 2013; to various individuals regarding working conditions at York Distribution Centre (YDC). **The contents of this letter are of significant concern to Canada Post Corporation; specifically your comments regarding repercussions if your concerns are not addressed.**

You are hereby advised not to enter any Canada Post Corporation facility; other than those accessible to the general public. You will be contacted and advised when you are required to attend an interview as part of the investigation process.

A copy of this document will be placed on your personal file.

NAME: Saarah Quamina
TITLE: Superintendent
DATE: January 14, 2013

(emphasis added)

[20] Also on January 14, 2013, but for a separate incident, CPC suspended Mr. Bazrafshan from duty:

EFFECTIVE: Monday January 14 2013 upon receipt

You are hereby suspended from duty. You are instructed to report to Alton James at the commencement of your regularly scheduled shift on Tuesday January 15 2013.

The reason(s) for the suspension is/are:

Your insubordinate behavior at approximately 0825 hours when you raised your voice to manager Kimti Aggarwal and shouted that he was incompetent and was breaking the law and causing a disruption on the workforce.

[21] On January 30, 2013, the CHRC responded to Mr. Bazrafshan's January 8, 2013 email:

We have carefully reviewed your correspondence, and it does not appear that the matters you raise are linked to a ground in the Act. As a result, the Commission is not the appropriate organization to deal with this matter. Also, the Commission is corrective in its *[sic]* mandate and since the situation was dealt with by management, may we suggest that you contact your union representative to discuss your views on the actions taken by management.

[22] On February 1, 2013, CPC imposed a three-day suspension on Mr. Bazrafshan for the January 14, 2013 comments directed towards a CPC manager. The dates for serving the suspension occurred during Mr. Bazrafshan's ongoing indefinite suspension:

I have completed a review of your personal file and the narrative of interview dated January 22, 2013 which was a summary of the interview conducted with you regarding your inappropriate behavior/language, specifically on Monday January 14th 2013 at approximately 08:30 when you raised your voice to Manager Kimti Aggarwal and shouted "that he was incompetent and was breaking the law" and causing a disruption on the work floor. This outburst resulted in an emergency suspension without pay from work.

Mr. Bazrafshan, raising your voice and calling the YDC manager, Kimti Aggarwal, incompetent, and causing a disruption on the work floor were inappropriate, and unacceptable. Your behavior and comments towards YDC manager violates Canada Post policy and is conduct that cannot be tolerated.

In light of your behaviour, you are being assessed a three (3) days suspension without pay. Since you have been on indefinite suspension, this suspension will be assessed against the following days:

Tuesday Jan 15 2013,
Wednesday Jan 16 2013,
Friday Jan 18 2013.

Mr. Bazrafshan, I'd like to take this opportunity to inform that further misconduct of this nature will be subject to progressive discipline up to including discharge from Canada Post.

(emphasis added)

[23] On February 4, 2013, CPC directed Mr. Bazrafshan to report to work for a return to work meeting:

This is to inform you that you are instructed to report to work at YDC (1860 Midland Ave, Scarborough, ON) at 07:00 hours on Tuesday Feb 05 2013. **There will be a return to work meeting between you, your union representative, and YDC management at 07:00 hours.** Discussion will be regarding to your indefinite suspension and return to work.

(emphasis added)

[24] On February 8, 2013, Human Resources and Skills Development Canada (HRSDC, as it was then known), on behalf of the Minister of Labour, responded to certain emails Mr. Bazrafshan had sent:

On behalf of the Honourable Lisa Raitt, Minister of Labour, **I am responding to your e-mails of December 20, 2012, and January 31, 2013, in which you express concerns regarding bullying in the work place.**

The Government of Canada takes all violent acts in the work place seriously, including psychological violence, which is why, on May 28, 2008, the Canada Occupational Health and Safety Regulations were amended to include Part XX, titled, "Violence Prevention in the Work Place". Part XX requires all employers under federal jurisdiction to address and prevent physical as well as psychological violence such as bullying, teasing and other aggressive behaviour.

To address your concerns in an expedient manner, your e-mail is being forwarded to the Labour Program's Toronto District Office so it can be assigned to a Health and Safety Officer for further action. Someone from the District Office should be in contact with you shortly. For future reference the contact information for the Toronto District Office is provided below:

Labour Program-Toronto District Office
4900 Yonge Street-Penthouse
North York ON M2N 6A4
1-800-641-4049

(emphasis added)

[25] On March 5, 2013, the Labour Program acknowledged receipt of Mr. Bazrafshan's complaint against CPC under Part II of the *Code*:

This will acknowledge receipt of your written complaint against CANADA POST CORPORATION.

Domenico Iacobellis, Health and Safety Officer, telephone number (416) 973-0559, has been assigned to investigate the matter. You will be contacted for further information, as required, or informed of the findings once the investigation is complete.

[26] In a March 15, 2013 letter, CPC required Mr. Bazrafshan to remain off work due to concerns they had about his fitness to work:

The Corporation has noticed recent behaviours by you which are a significant cause of concern for us at the Canada Post Corporation. These behaviours include actions and conduct on the workfloor, as well as the content, nature and tone of recent and continuing emails and letters sent by you to various parties and entities.

We are sincerely concerned for your health and well being at this time and want to offer you our full support in this matter.

To assist us in this regard, we have engaged our third party Disability Management provider Great West Momeau Shepell to assist and assess your fitness for work at this time. You will be contacted by them within 24 hours of receiving this letter to guide you through this process. It is my expectation that you will co-operate fully with them and provide to them whatever medical information may be necessary to determine your fitness to work.

During this time, we will require you to remain off work until further notice. You will not incur any loss of pay during the time that you are co-operating with Great West Momeau Shepell to determine whether [you] are fully fit to return to work. Your return to the workplace will be conditional based on their medical assessment of your ability to safely return to work.

(emphasis added)

[27] Mr. Bazrafshan also included, among his attachments, a March 25, 2013 complaint form he had filed under Part II of the *Code*. The particular form he used explicitly stated: "Do not use for refusals to work in case of danger (refer to section 128 of the *Code*)".

[28] Mr. Bazrafshan described the nature of his March 25, 2013 complaint on the form:

Nature of Complaint: Violation of Health & Safety Act
Violation of Labour Code, Violation of Human Rights
-Lax to repair the north dock heater, despite months of complaint
-Lax to repair north dock safety plates #17 & 27, despite months of complaint
-Lax to repair Step Van's bulk door despite months of complaint
-Creation of fearful work environment ; Creation of unsafe workplace
-Addition of extra work without extra time which lead to 'rush' and injury,
despite months of complaint...& More...

[sic]

[29] Mr. Bazrafshan continued to correspond with CPC and CUPW officials, as set out in this extract from his April 12, 2013 email to the CPC's President and Chief Executive Officer and one of its Senior Vice-Presidents:

Dear Mr. Chopra and Dear Mr. Jones:

I certainly appreciate that you have taken time off your busy schedule to for once respond to my numerous emails after all these months.

As of now, I will refer to 'Bullies' and 'Bullying' as a 'Criminals,' 'Criminal Activity' or 'Violent Criminal Activity' as per Prime Minister's statement, yesterday.

The following clips are for you to view, just in case you missed the shocking news.

(Please be patient, it might take a few seconds to reboot.)

...
Mr. Chopra, your supervisors, managers and director(s) have engaged in violent criminal activities for the last number of years. Above the non-effective grievance procedure, I also sought assistance from the local police, written to your predecessors, to your VP. I have met with lawyers. None of these attempts are effective due to CPC's internal legal system, which has been broken by your criminal management anyway.

I know that your criminal supervisors want to criminalize me, and eliminate any and all alternative way out for me. I must submit to your supervisors' criminal activities, quit my job, or harm myself or perhaps harm your criminal supervisors. You and your VP are perfectly aware of it.

But, that none of the above behaviour is my characteristic, or will ever be, as I think of these as pathetic and weak accusations by your criminal supervisors to frame me.

I'm an excellent and keen employee, love my job and love my family dearly. I'm also a Union activist and for that I have been punished, as many other good employees at CPC have been.

[sic]

[30] As part of a short term disability (STD) benefits claim, arrangements were made for Mr. Bazrafshan to meet with a forensic psychiatrist. On April 17, 2013, Mr. Bazrafshan expressed significant concerns he had following the initial meeting with the assigned forensic psychiatrist.

[31] On May 24, 2013, Mr. Bazrafshan issued a Press Release about a hunger strike he would be starting on June 3, 2013 at the CPC's head office in Ottawa.

[32] On May 25, 2013, Mr. Bazrafshan's family physician provided a medical note which suggested that Mr. Bazrafshan should not return to work until the ongoing issues, as described in that note, had been resolved.

[33] In a May 31, 2013 letter to Mr. Bazrafshan, Great West/Morneau Shepell, which had reviewed his STD claim, determined that he could return to work as of June 3, 2013. That letter set out the details for a facilitated return to work meeting scheduled for that date.

[34] Mr. Bazrafshan did not attend that return to work meeting. The remainder of the attachments to his complaint detail the correspondence which went back and forth regarding his return to work.

[35] For example, in a June 2, 2013 email, CPC advised Mr. Bazrafshan that, if he did not attend the return to work meeting on June 3, 2013, he would be considered "absent without leave starting June 4, 2013".

[36] CPC later set up an independent medical exam (IME) for July 17, 2013. CUPW acting on Mr. Bazrafshan's behalf, wrote to CPC on July 9, 2013:

I have been informed by Kiomars Bazrafshan and asked to communicate to you and Canada Post Corporation, that he will not be available to participate in the IME process which you have unilaterally set up for him for the 17th July 2013. Mr. Bazrafshan is stating that he will not be in Toronto on July 17th 2013 and therefore, will be unable to be at your IME appointment.

In the light of this development he will not be signing (as you demanded 'no later than Tuesday, July 9, 2013) the compulsory consent order sent along with your IME notification letter, in an Electronic-Mail, dated July 5th 2013. This same letter informed Mr. Bazrafshan in a rather threatening manner: "*Please be advised, if you fail to cooperate, and provide your consent to Great West Life, and attend this IME appointment, your non-compliance status will result in discipline, up to and including discharge.*"

In order to avoid you coming to unwarranted conclusions and taking hasty action, concerning Mr. Bazrafshan's employment, I am at this time communicating to you the information which he has asked me to give to you and Canada Post Corporation on this matter.

(italics in original)

[37] On July 10, 2013, CPC wrote to Mr. Bazrafshan again regarding the latter's decision not to sign a consent form releasing medical information to Great West and his stated intention not to attend the July 17, 2013 IME appointment. Mr. Bazrafshan responded by letter dated July 12, 2013 setting out his position.

[38] CPC responded that same day and noted, *inter alia*, its view that clause 33.10(c) of the collective agreement allowed for further medical examinations.

[39] On July 15, 2013, CPC sent a letter to Mr. Bazrafshan discharging him from its employment. In a July 18, 2013 letter, CPC rescinded the July 15, 2013 discharge letter and replaced it with a second discharge letter on the basis that "a more comprehensive letter should

have been sent to you in order to explain the reasons for your discharge." Mr. Bazrafshan responded on July 24, 2013, with his view of the situation.

[40] In a July 30, 2013 letter, the Labour Program at HRSDC wrote to Mr. Bazrafshan advising him that it did not have jurisdiction over his complaint, since he was no longer a CPC employee. That letter advised him of this Board's complaint process:

This letter is further to your complaint dated March 24, 2013, against CANADA POST CORPORATION. We have reviewed your complaint, and have determined that the Labour Program does not have jurisdiction to investigate your complaint, as you are no longer an employee and as the subject matter of your complaint falls within the purview of section 133 of the Canada Labour Code, Part II.

Please note that the *Canada Labour Code Part II* has established **a time limit for you to register your complaint of 90 days** from the date on which you knew or in the Board's view you ought to have known, of the action or circumstances giving rise to your complaint. We therefore suggest that you immediately forward your complaint to the Canada Industrial Relations Board (CIRB), who has the power to investigate your complaint.

Canadian Industrial Relations Board
1 Front Street West
Toronto, Ontario
M5J 2X7
E-mail: info@cirb-ccri.gc.ca
Toll free number : 1-800-575-9696

The Labour Program of Human Resources and Skills Development of Canada can, therefore, take no further action on your behalf.

(Bold in original; italic bold emphasis added)

[41] The Labour Program's letter advising Mr. Bazrafshan that his matter fell within this Board's jurisdiction presumably led to his August 26, 2013 complaint.

III. Relevant Statutory Provisions

[42] Part II of the *Code* creates a focussed complaint jurisdiction for the Board.

[43] Section 147 of the *Code* prohibits an employer from retaliating against an employee for his/her participation in a health and safety process:

147. No employer shall dismiss, suspend, lay off or demote an employee, impose a financial or other penalty on an employee, or refuse to pay an employee remuneration in respect of any period that the employee would, but for the exercise of the employee's rights under this Part, have worked, or take

any disciplinary action against or threaten to take any such action against an employee because the employee

(a) has testified or is about to testify in a proceeding taken or an inquiry held under this Part;

(b) has provided information to a person engaged in the performance of duties under this Part regarding the conditions of work affecting the health or safety of the employee or of any other employee of the employer; or

(c) has acted in accordance with this Part or has sought the enforcement of any of the provisions of this Part.

[44] As section 147 sets out, an employee's participation could result from giving testimony in a proceeding and/or providing information relating to a Part II matter. It also encompasses acting in accordance with, or seeking the enforcement of, Part II of the *Code*.

[45] Section 133 of the *Code* governs an employee's complaint alleging a violation of section 147:

133. (1) An employee, or a person designated by the employee for the purpose, who alleges that an employer has taken action against the employee in contravention of section 147 may, subject to subsection (3), make a complaint in writing to the Board of the alleged contravention.

(2) The complaint shall be made to the Board not later than ninety days after the date on which the complainant knew, or in the Board's opinion ought to have known, of the action or circumstances giving rise to the complaint.

(3) A complaint in respect of the exercise of a right under section 128 or 129 may not be made under this section unless the employee has complied with subsection 128(6) or a health and safety officer has been notified under subsection 128(13), as the case may be, in relation to the matter that is the subject-matter of the complaint.

(4) Notwithstanding any law or agreement to the contrary, a complaint made under this section may not be referred by an employee to arbitration or adjudication.

(5) On receipt of a complaint made under this section, the Board may assist the parties to the complaint to settle the complaint and shall, if it decides not to so assist the parties or the complaint is not settled within a period considered by the Board to be reasonable in the circumstances, hear and determine the complaint.

(6) A complaint made under this section in respect of the exercise of a right under section 128 or 129 is itself evidence that the contravention actually occurred and, if a party to the complaint proceedings alleges that the contravention did not occur, the burden of proof is on that party.

(emphasis added)

[46] The Legislator in section 133(2) included a 90-day time limit for complaints. Similarly, it included certain procedural requirements for cases involving a work refusal (section 133(3)). The employer may bear the burden of proof, but only for complaints involving a work refusal (section 133(6)).

[47] Section 128(1) commences the work refusal process:

128. (1) Subject to this section, **an employee may refuse to use or operate a machine or thing, to work in a place or to perform an activity, if the employee while at work has reasonable cause to believe that**

- (a) the use or operation of the machine or thing constitutes a danger to the employee or to another employee;
- (b) a condition exists in the place that constitutes a danger to the employee; or
- (c) the performance of the activity constitutes a danger to the employee or to another employee.

(emphasis added)

[48] Section 128(1) contains two threshold questions:

- i) was the employee "at work" at the time of the refusal; and
- ii) did the employee have "reasonable cause to believe" danger existed?

IV. Issues

[49] Mr. Bazrafshan's complaint requires the Board to resolve the following issues:

- A. Were any parts of Mr. Bazrafshan's complaint filed outside the time limits in section 133(2)?
- B. Did Mr. Bazrafshan exercise the right to refuse work?
- C. Did CPC discipline and/or dismiss Mr. Bazrafshan as a result of his raising of health and safety issues?

V. Analysis and Decision

[50] This case is similar, though not identical, to a situation the Board recently faced in *Leslie*, 2013 CIRB 694 (*Leslie 694*). In *Leslie 694*, *supra*, a clear work refusal had occurred.

[51] The Board in *Leslie 694*, *supra*, noted the challenges which arose when a Part II complaint was just one element in a larger labour relations situation:

[50] Decisions for the Board in this area evidently become more challenging when a *Code* complaint is just one element in a pre-existing labour relations situation involving accommodation for medical reasons, as well as grievances under the collective agreement. In a different scenario, the Board might have found Mr. Leslie lost his home route as a direct result of his work refusal. Only the overall context in this case persuaded the Board otherwise.

[52] Clearly, nothing limits an employee's right to file a Part II complaint with this Board merely because related issues have also arisen under the collective agreement. A Part II safety complaint falls under the Board's exclusive jurisdiction, rather than under that of a labour arbitrator, as noted in *Cahoon*, 2010 CIRB 548:

[11] Part II of the *Code*, however, contains section 133(4) which prevents an employee from referring a safety complaint to arbitration:

133(4) Notwithstanding any law or agreement to the contrary, a complaint made under this section may not be referred by an employee to arbitration or adjudication.

[12] The *Code* prevents Mr. Cahoon from having his Part II complaint determined by arbitration or adjudication. He retains carriage of his safety complaint and can require a decision on the merits of the dispute.

[13] Thirdly, since Mr. Cahoon could not refer his complaint to arbitration or adjudication, and Arbitrator Picher only determined a grievance under a collective agreement, there has been no decision on Mr. Cahoon's allegation that CN retaliated against him for his alleged attempt to assert his Part II safety rights.

[53] Nonetheless, Part II of the *Code* is not a duplicate process designed to deal concurrently with collective agreement issues involving discipline and dismissal. In this case, the Board must determine whether there are grounds for intervention under Part II of the *Code*. Any collective agreement issues remain foreign to this analysis.

A. Were any parts of Mr. Bazrafshan's complaint filed outside the time limits in section 133(2)?

[54] CPC raised a preliminary objection that Mr. Bazrafshan's August 26, 2013 complaint was untimely.

[55] For ease of reference, section 133(2) reads:

133(2) The complaint shall be made to the Board not later than ninety days after the date on which the complainant knew, or in the Board's opinion ought to have known, of the action or circumstances giving rise to the complaint.

[56] As CPC correctly pointed out, the Board determines timeliness by considering when the complainant “knew, or ... ought to have known, of the action or circumstances giving rise to the complaint”.

[57] CPC further suggested that the Board had no authority to modify the 90-day time limit.

[58] Rather than reproducing all of the Board’s statutory powers in Part II, the Legislator included section 156, which incorporates the Board’s powers from Part I of the *Code* into Part II:

156.(1) Despite subsection 14(1), the Chairperson or a Vice-Chairperson of the Board, or a member of the Board appointed under paragraph 9(2)(e), may dispose of any complaint made to the Board under this Part and, in relation to any complaint so made, that person

(a) has all the powers, rights and privileges that are conferred on the Board by this Act other than the power to make regulations under section 15; and

(b) is subject to all the obligations and limitations that are imposed on the Board by this Act.

(2) The provisions of Part I respecting orders and decisions of and proceedings before the Board under that Part apply in respect of all orders and decisions of and proceedings before the Board or any member thereof under this Part.

(emphasis added)

[59] In Part I of the *Code*, section 16(*m.1*) allows the Board to extend the time limits for instituting a “proceeding”:

16. The Board has, in relation to any proceeding before it, power

(*m.1*) to extend the time limits set out in this Part for instituting a proceeding.

[60] Accordingly, the Board can extend the 90-day time limit in section 133(2) of the *Code* for instituting a Part II proceeding.

[61] The Board does not exercise this discretion to extend time limits routinely, but only in exceptional situations. The Board noted in *Torres*, 2010 CIRB 526, upheld by the Federal Court of Appeal in *Buenaventura Jr. v. Telecommunications Workers Union*, 2012 FCA 69, that complaints should be brought within the 90-day period:

[19] The Board will not automatically relieve a party from compliance with the 90-day time limit for the filing of an unfair labour practice complaint. The Legislator has

always emphasized that labour relations matters must be brought to the Board forthwith. Potential respondents are entitled to know whether they need to preserve evidence and otherwise prepare for a complaint under the *Code*.

[62] Mr. Bazrafshan alleged that CPC violated section 147 when it suspended him on January 14, 2013 as a reaction to his sending, *inter alia*, the January 8, 2013 email. The Board finds this aspect of the complaint to be untimely.

[63] Mr. Bazrafshan did refer to possible safety issues from previous years in his January 8, 2013 email. In the Board's view, if Mr. Bazrafshan felt that the January 14, 2013 suspension resulted from the January 8, 2013 email, then he had 90 days from this event to file a complaint with this Board. He clearly knew, or ought to have known, of the circumstances giving rise to a potential complaint related to this specific incident.

[64] Merely copying the Board on an email sent to many individuals and tribunals could not constitute a complaint under the *Code*. Indeed, on January 11, 2013, the Board had advised Mr. Bazrafshan in writing that his email could not constitute a complaint.

[65] Mr. Bazrafshan did not provide any compelling reasons why the Board should exercise its discretion to extend the time limits. Between January, 2013 and his August 26, 2013 complaint, he was able to commence other proceedings, such as that in his March 25, 2013 complaint to the Labour Program. The Board does not view this situation as exceptional and accordingly declines to modify the 90-day time limit.

[66] The Board does find Mr. Bazrafshan's complaint timely concerning whether his termination of employment in July, 2013, as well as other events occurring within 90 days of the August 26, 2013 complaint, resulted in whole or in part from his exercise of rights under Part II of the *Code*.

B. Did Mr. Bazrafshan exercise the right to refuse work?

[67] The burden of proof is only reversed under section 133(6) if a complainant has properly exercised the right to refuse work under section 128(1) of the *Code*.

[68] CPC contested Mr. Bazrafshan's allegation in paragraph 10 of his complaint that he validly refused to work in May, 2013:

10. Further, Canada Post Corporation ignored my health and safety concerns and my work refusal that I raised and forwarded through a letter by my family physician dated May 25th, 2013.

[69] Mr. Bazrafshan further alleged in his September 16, 2013 reply that he refused to work under the *Code* when he refused to attend CPC's scheduled June 3, 2013 return to work meeting.

[70] The Board has not been satisfied that a valid work refusal occurred on the facts of this case. Section 128(1) requires that an employee be "at work" in order to exercise the right to refuse work: *Saumier v. Canada (Attorney General)*, 2009 FCA 51. A medical note from a doctor regarding an employee who is not at work cannot constitute a valid work refusal.

[71] Section 133(3) makes it clear that an employee who invokes a work refusal must have complied with section 128(6) of the *Code*:

128.(6) **An employee** who refuses to use or operate a machine or thing, work in a place or perform an activity under subsection (1), or who is prevented from acting in accordance with that subsection by subsection (4), **shall report the circumstances of the matter to the employer without delay.**

(emphasis added)

[72] The work refusal process is predicated on the employee being present to participate in the *Code*'s mandatory investigation process. This cannot occur if the employee is not at work.

[73] In addition, Mr. Bazrafshan's March, 2013 written complaint under Part II of the *Code* was explicitly not a work refusal, as indicated on the complaint form itself, *supra*. A refusal to attend the June 3, 2013 return to work meeting similarly did not meet the requirements of a valid work refusal.

[74] Since there is no work refusal on the facts of this case, the burden of proof remains with Mr. Bazrafshan. He has the obligation to demonstrate to the Board that CPC retaliated against him because he raised safety concerns under Part II of the *Code*.

C. Did CPC discipline and/or dismiss Mr. Bazrafshan as a result of his raising of health and safety issues?

[75] The Board in *Paquet*, 2013 CIRB 691 described the analysis it applies in a non-work refusal situation where a complainant bears the burden of proof.

[60] This interplay of sections 147 and 133 gives rise to a three-step analysis. Each step must be passed successfully in order for the Board to find a *Code* violation.

1. Did Air Canada impose, or threaten to impose, discipline?
2. Were the employees participating in a Part II Process?
3. Did a nexus exist between the Part II Process and Air Canada's discipline?

[76] The Board will deal with these three elements in the same order in this case.

1. Did CPC impose, or threaten to impose, discipline?

[77] The parties did not contest this criterion. The chronology of events set out above provides multiple examples of threats to impose discipline. CPC also later terminated Mr. Bazrafshan.

[78] Unlike in some cases where there may be a dispute whether discipline ever occurred, that is not an issue in this case.

2. Was Mr. Bazrafshan participating in a Part II process?

[79] The Board is similarly satisfied that Mr. Bazrafshan was participating in a Part II process when discipline occurred. The facts demonstrate that his January 8, 2013 allegations, which had originally been emailed to the Minister of Labour, among many others, were forwarded to HRSDC's Labour Program.

[80] On March 5, 2013, the Labour Program acknowledged receipt of his complaint. On March 25, 2013, Mr. Bazrafshan filed a formal Part II complaint with the Labour Program.

[81] On July 30, 2013, the Labour Program wrote to Mr. Bazrafshan and suggested it did not have jurisdiction over the March, 2013 complaint, since Mr. Bazrafshan had ceased to be a CPC employee in July, 2013:

This letter is further to our complaint dated March 24, 2013, against CANADA POST CORPORATION. **We have reviewed your complaint, and have determined that the Labour Program does not have jurisdiction to investigate your complaint, as you are no longer an employee** and as the subject matter of your complaint falls within the purview of section 133 of the *Canada Labour Code*, Part II.

(emphasis added)

[82] The Board has trouble understanding how Mr. Bazrafshan's later termination impacted the Labour Program's jurisdiction over his earlier complaint.

[83] This Board's decision in *Rathgeber*, 2010 CIRB 536 (*Rathgeber 536*) commented on the role the *Code* grants a Health and Safety Officer (HSO), as contrasted with the role reserved to the Board. An HSO deals with alleged substantive contraventions of Part II. The Board, on the other hand, deals with disciplinary reprisals.

[84] An employee's later discipline or discharge may give rise to a reprisal complaint to the Board. But how can it have any impact on an earlier compliance complaint filed with the Labour Program? The Board commented on a similar situation in *Rathgeber 536, supra*:

[35] A Health and Safety Officer may examine Mr. Rathgeber's complaint and determine that there is no contravention of section 135.1 and thus not issue a direction. But that is different from advising a complainant like Mr. Rathgeber that HRSDC has no jurisdiction even to consider the issue and that the proper recourse is to the CIRB.

[36] To summarize, Health and Safety Officers deal initially with allegations of Part II contraventions. The Board only deals with reprisals with its limited regime created by sections 133 and 147. One matter could involve both a compliance issue and a reprisal complaint as described in *Tony Aker, supra*. However, the Board has no authority to police alleged Part II substantive contraventions. It is up to HRSDC to determine whether a contravention has taken place.

[37] The Board has considerable sympathy for Mr. Rathgeber's frustration with the process. Fortunately, Mr. Rathgeber advised during the CMC that CN and he had arrived at an understanding for his current and future Health and Safety Committee work. He would, however, like an answer to the Part II contravention he raised formally with HRSDC on September 17, 2009.

[85] Despite this confusion surrounding Mr. Bazrafshan's March, 2013 complaint to the Labour Program, he has demonstrated he was participating in a Part II process at the material times to this complaint.

3. Did a nexus exist between the Part II process and CPC's discipline?

[86] The crux of the analysis in many of these cases concerns whether discipline occurred as a result of the complainant's involvement in a Part II process, or for some other unrelated reason. There are clearly several labour relations issues between Mr. Bazrafshan and CPC. Presumably, though this is ultimately a decision for CUPW, they may be explored before a labour arbitrator.

[87] Has Mr. Bazrafshan convinced the Board that CPC threatened to discipline him, and later terminated his employment, because of his participation in a Part II process?

[88] The Board is satisfied that there were ongoing labour relations issues between Mr. Bazrafshan and CPC long before he filed his August 26, 2013 complaint. CPC took the significant step of removing Mr. Bazrafshan from service on the basis of various comments he made in written documentation. Some of these comments referred to bullying and harassment, subject matters which could, depending on the facts of each case, fall under Part II of the *Code*.

[89] But Mr. Bazrafshan did not demonstrate to the Board's satisfaction that his involvement in a Part II process caused CPC, in whole or in part, to:

- i) require him to attend a facilitated return to work meeting;
- ii) consider him AWOL;
- iii) require that he sign a consent form for Great West Life ; and
- iv) attend an IME.

[90] The Board was satisfied that numerous ongoing collective agreement related issues arose between the parties and that these resulted in CPC's actions, including those involving discipline and discharge. Whether CPC was justified in taking any of these actions is for a labour arbitrator to decide under the collective agreement. The Board is satisfied CPC's actions were not reprisals for Mr. Bazrafshan's lawful participation in a Part II process.

[91] The Board accordingly dismisses Mr. Bazrafshan's complaint.

Graham J. Clarke
Vice-Chairperson